IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RODOLFO DIAZ, Individually and On Behalf of All Others Similarly Situated,	§	
Plaintiff,	§	
	§	CIVIL ACTION NO. 4:15-cv-01282
v.	§	
	§	
APPLIED MACHINERY CORPORATION; NABORS CORPORATE SERVICES, INC. and NABORS INDUSTRIES, INC.	§	
Defendants	§	

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTIONS FOR LEAVE TO FILE NOTICES OF CONSENT [DOCS. 206; 208; 210; 212; 214; 216; 218; 220; 224; 228]

Defendants Nabors Corporate Services, Inc. and Nabors Industries, Inc. (collectively, "Nabors"), file this Response to Plaintiffs' Motions for Leave to File Notices of Consent [Doc. 206; 208; 210; 212; 214; 216; 218; 220; 224; 228]:

I. SUMMARY

Since Defendants filed their Joint Motion for Partial Summary Judgment on Statute of Limitations and Willfulness [Doc. 202], various Plaintiffs have filed Motions for Leave to file Notices of Consent. These notices of certain named plaintiffs should be considered filed if and/or when leave has been granted by this Court.

Should this Court deny these Plaintiffs leave, those certain named plaintiffs are not entitled to proceed on individual bases because of their failures to put Defendants and this Court on notice of any individually-filed action. At that time, those plaintiffs' claims should be dismissed. *See* [Doc. 202].

II.
RELEVANT FACTS

On May 1, 2017, Nabors and AMC filed their Joint Motion for Partial Summary Judgment on Statute of Limitations and Willfulness [Doc. 202]. Generally, Defendants alleged that Plaintiffs initiated this collective action lawsuit on behalf of themselves and all others similarly situated for alleged unpaid overtime wages pursuant to the FLSA, 29 U.S.C. § 216(b). However, Plaintiffs failed to commence their collective action claims for statute of limitations purposes by filing written consents with the Court.

Plaintiffs have not yet responded to Defendants' motion [Doc. 202],[1] but have filed several motions for leave [Doc. 206; 208; 210; 212; 214; 216; 218; 220; 224; 228] to file the consent forms for:

Doc. 206
- Abraham Francisco Puga-Reyna
- Alejandro Rodriguez
- Celso Elias Ochoa
- Felipe Cosme Ocanas-Villagrana[2]
- Jorge Luis Vazquez
- Jose De La Luz Quino-Rodriguez
- Luis Mario Montalvo-Rodriguez
- Luis Roberto Mora Corpus
- Marco Antonio Arizpe-Sanchez
- Ricardo Comenares Garcia

Although Ignacio Cazares and Ricardo Villanueva Esquivel's consents were attached with those above, Plaintiffs' motion did not include a request for leave for these two plaintiffs.

Doc. 208
- Francisco Coronado

Doc. 210
- Jorge Vazquez Pecina

[1] *See* [Doc. 222, Joint Motion for Extension of Time for Plaintiffs to respond to Defendants' Joint Motion for Partial Summary Judgment on Statute of Limitations and Willfulness]

[2] Although named as "Felipe Cosme Ocanas-Villagrana" on all relevant pleadings, plaintiff reports that he worked at the AMC yard under the name "Felipe Ramirez."

Doc. 212
- David Celvas Garcia

Doc. 214
- Ulises Filomeno Avila

Doc. 216
- Ramiro Amilcar Galan

Doc. 218
- Alberto Zavala Aviles
- Alonso Marquez Arreola
- Esteban Fuentes Duran
- Luis Enrique Serrano Gonzales

Doc. 220
- Rodrigo Campos

Doc. 224
- Sergio Raymundo Guzman-Rodriguez

Doc. 228

- Francisco Cedillo
- Juan Linares Guerra

III.
ARGUMENT AND AUTHORITIES

First, as Nabors and AMC stated in their Joint Motion for Partial Summary Judgment on Statute of Limitations and Willfulness [Doc. 202], courts uniformly construe 29 U.S.C §§ 255-256 to require all those wishing to be plaintiffs in a FLSA collective action – including those named in the caption of the complaint – to file written consents separate and apart from the complaint in order to commence their claims against the defendant. *See* [Doc. 202, pp. 7-9]. Because Plaintiffs have pursued this matter as a collective action, Plaintiffs are required to file their written consents to commence their FLSA action. *See* [Doc. 202, pp. 9-10].

As Plaintiffs continue to file their motions for leave to file their consents, Plaintiffs have not commenced their claims until this Court deems the consents actually filed. 29 U.S.C § 256(b);[3] *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 916-17 (5th Cir. 2008); *Moran v. Ceiling Fans Direct, Inc.*, 2007 WL 3256571, *3 (S.D. Tex. Nov. 5, 2007) ("No individual claimant both is specifically named in the complaint and filed a written consent on the date the complaint was filed. As a result, pursuant to § 256(b), the date this FLSA lawsuit is 'considered to be commenced' for purposes of the statute of limitations, is the date the individual subsequently filed such written consent"); *Quintanilla v. A & R Demolition Inc.*, CIV.A. H-04-1965, 2006 WL 1663739, at *1 (S.D. Tex. June 13, 2006) ("'Case authority has interpreted the statutory sections as requiring all plaintiffs in a collective action under the FLSA to file written consents for statute of limitations purposes.' Signed consents filed after the filing of the complaint do not relate back to the date the complaint was filed").

Accordingly, Plaintiffs have not properly commenced their claims until this Court grants leave and accepts the filings of the Plaintiffs' consents.

A. PLAINTIFFS' MOTIONS ARE LIMITED TO LEAVE TO FILE WRITTEN CONSENTS ONLY

Plaintiffs' motions [Doc. 206; 208; 210; 212; 214; 216; 218; 220; 224; 228] are requests for leave to file notices of consents *only*. But within their motions, Plaintiffs have also included a peripheral request that should this Court deny Plaintiffs leave, Plaintiffs wish to pursue their individual claims. *See* [Doc. 206; 208; 210; 212; 214; 216; 218; 220; 224; 228]. The relief sought is inappropriate.

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[3] "In determining when an action is commenced for the purposes of section 255 of this title, an action commenced on or after May 14, 1947 under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], the Walsh-Healey Act, or the Bacon-Davis Act, shall be considered to be commenced on the date when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act of 1938, as amended, or the Bacon-Davis Act, it shall be considered to be commenced in the case of any individual claimant—
(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint ***and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or***
(b) if such written consent was not so filed or if his name did not so appear—on the subsequent date on which such written consent is filed in the court in which the action was commenced" (emphasis added).

1. Plaintiffs have Not Filed this Action in a Dual Capacity

First, contrary to Plaintiffs' position, they have not established that they have actually filed this action in a dual individual and collective action capacity. The live complaint in this matter [Doc. 28] averred that Plaintiffs brings this action "under to 29 U.S.C. § 216(b) on behalf of themselves and all other similarly situated employees" and included Count Three entitled, "Collective Action Allegations." [Doc. 28]. Factually similarly cases have held that where allegations are unclear on the complaint, such FLSA plaintiffs have not sufficiently pleaded their claims in dual individual and collective capacities.

For example, in *Gessele v. Jack in the Box, Inc.*, 6 F. Supp. 3d 1141, 1158 (D. Or. 2014), *as amended* (May 15, 2014), the plaintiffs did not make any suggestion in any of their complaints or briefings on certification that they were proceeding in dual or individual capacities until after defendants asserted plaintiffs failed to file timely written consents. Additionally, although all of the *Gessele* complaints purported to be brought by named plaintiffs "suing on behalf of themselves and all others similarly situated," none of the complaints have clearly set out individualized claims. Instead, all of the *Gessele* claims were styled as "Collective and Class Allegation[s]." *Id.* Similarly, in *Faust v. Comcast Cable Communications Mgmt., LLC*, CIV.A. WMN-10-2336, 2013 WL 5587291, at *8 (D. Md. Oct. 9, 2013), although plaintiffs repeated the phrase "individually and on behalf of all others similarly situated" in multiple filings, they never asserted in any other manner their ***intention*** to proceed by way of anything other than a collective action. The *Faust* court held that a mere recitation in pleadings of the phrase "individually and on behalf of all others similarly situated," absent any further indication in the complaint or subsequent filings of an intention to proceed in a dual capacity, is not sufficient to put the employer and the court on notice of an individually-filed action. *See also Gordon v. TBC Retail Group, Inc.*, 2:14-CV-03365-DCN, 2016 WL 4247738, at *13 (D.S.C. Aug. 11, 2016) (where it was not clear from the complaint, entitled "Collective Action Complaint," that the named plaintiffs intended to bring their claims in dual capacities. The complaint also stated that plaintiffs were bringing the suit "as a collective action pursuant to the collective action provisions of 29 U.S.C. § 216(b) on behalf of themselves and all other similarly situated employees," and only contained general terms about conditions applicable to all plaintiffs and other similarly situated employees. The court held that scattered references to an "individual" action do not provide the clarity needed to invoke the dual capacity argument.); *Frye v. Baptist Mem'l Hosp., Inc.*, 07-2708, 2011 WL 1595458, at *5 (W.D. Tenn. Apr. 27, 2011), *aff'd*, 495 Fed. Appx. 669 (6th Cir. 2012) ("There is no reason to treat Frye's claim as an individual action when, on the face of his complaint, he asserted a representative action on behalf of himself and all similarly situated hourly employees.").

Here, as in *Gessele* and *Faust*, Plaintiffs have never raised the possibility of proceeding on an individual capacity until after Defendants filed their motion for summary judgment on Plaintiffs' failure to file timely written consents. *Gessele*, 6 F. Supp. 3d at 1158; *Faust*, 2013 WL 5587291, at *8; [Doc. 202]. As in *Gessele*, Plaintiffs have made no individualized claims, but entitled their cause of action as "Collective Action Allegations." *Gessele*, 6 F. Supp. 3d at 1158; [Doc. 28].

And as in *Frye* and *Gordon*, Plaintiffs filed their action "on behalf of themselves and all others similarly situated" but failed to allege any further specifics on the individualized claims of the Plaintiffs. *See Frye*, 2011 WL 1595458, at *5; *cf Smith v. Central Security Bureau, Inc.*, 231 F.Supp.2d 455 (W.D.Va. 2002); *Gordon*, 2016 WL 4247738, at *13; [Doc. 28]. Accordingly, Plaintiffs have failed to put Defendants and this Court on clear notice of their intent to file in any capacity other than as a collective action. *Frye*, 2011 WL 1595458, at *5.

2. To Allege an Individual Action, Plaintiffs would have to Amend their Pleadings; It is too Late to Amend Pleadings and Plaintiffs have not Moved for Leave to Amend their Pleadings

Because Plaintiffs have failed to properly allege that they were seeking any claims in a dual individual and collective capacity, Plaintiffs would have to amend their pleadings to do so. However, the deadline to amend the pleadings in this matter was July 1, 2016. [Doc. 60]. Plaintiffs have made no attempt to seek leave to amend the necessary pleadings to proceed in an individual capacity. Therefore, should this Court deny Plaintiffs' motion for leave to file their consents, the appropriate remedy would be to dismiss those claims that have not been properly commenced.

IV.
CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court deem Plaintiffs' Notices of Consent filed as of the date accepted by the Court, and should this Court deny Plaintiffs' Motions for Leave, that the remedy be to dismiss those Plaintiffs' claims as they were not properly commenced, and such further relief in law and in equity to which they may show themselves justly entitled.

Respectfully submitted,

MARTIN, DISIERE, JEFFERSON & WISDOM, L.L.P.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing pleading has been served on this the 31st day of May, 2017 to all counsel of record.

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